Filed 2/9/10 In re D.E. CA4/3

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

In re D.E., a Person Coming Under the Juvenile Court Law.	
ORANGE COUNTY SOCIAL SERVICES AGENCY, Plaintiff and Respondent, v. D.E., et al., Defendants and Appellants.	G042264 (Super. Ct. No. DP017530) O P I N I O N

Appeal from an order of the Superior Court of Orange County, Jane L. Shade, Temporary Judge. (Pursuant to Cal. Const., art. VI, § 21.) Affirmed.

Liana Serobian, under appointment by the Court of Appeal, for Defendant and Appellant, Father.

Roni Keller, under appointment by the Court of Appeal, for Defendant and Appellant, Mother.

Nicholas S. Chrisos, County Counsel, Karen L. Christensen and Julie J. Agin, Deputy County Counsel, for Plaintiff and Respondent.

D.E. (Father) and C.B. (Mother) appeal from the order terminating parental rights to their son, D.E. (Welf. & Inst. Code, § 366.26.)[1] Father contends he was not given adequate notice of the proceedings, the juvenile court erred by summarily denying his section 388 petition, and he was entitled to reunification services. Father and Mother both contend the juvenile court erred by failing to apply the parental benefit exception to termination of parental rights. (§ 366.26, subd. (c)(1)(B)(i).) We find no error and affirm the order.

FACTS

Detention

Then 10-month-old D.E. was taken into protective custody on September 16, 2008. Father, who had a long-term substance abuse problem that was unresolved, was on parole. He was associated with white supremacist gangs and had an extensive criminal record including arrests and convictions for numerous drug-related offenses, burglary offenses, and weapons offenses. Mother, was similarly on parole with an unresolved substance abuse problem and an extensive criminal record including numerous arrests and convictions for drug and theft-related offenses. Mother had two older children. The oldest had been the subject of a dependency proceeding and was placed with the maternal grandmother when Mother failed to reunify with him. Mother voluntarily placed the other child with the maternal grandmother as well.

On September 16, police were searching for Father, who was a suspect in the stabbing of D.E.'s godfather. Police believed D.E. might have been present when the stabbing occurred. Father's whereabouts were unknown, but police stopped a "possible suspect vehicle," with Mother and two other adults in it. D.E. was also in the vehicle and was not in a car seat. Mother told police "she would not test clean." She was arrested, and D.E. was taken into protective custody.

[1] All further statutory references are to the Welfare and Institutions Code, unless otherwise indicated.

At the time of D.E.'s detention, the paternal grandfather told an Orange County Social Services Agency (SSA) social worker that Father and Mother were living with him in a mobile home located at 12721 Harbor Boulevard, No. 20, Garden Grove. But he explained the mobile home park was being closed and they were being evicted. The social worker tried to contact Father on his cellphone but could not leave a message as the voicemail box was full. Mother's parole agent told the social worker she had previously visited Mother at the Harbor Boulevard address and Father was residing with her there. Mother told the social worker Father was listed as the father on D.E.'s birth certificate, although he had never signed the certificate.

The petition, filed September 18, alleged jurisdiction under section 300, subdivisions (b) [failure to protect], (g) [no provision for support], and (j) [abuse of sibling]. Father was designated in the petition as an alleged father, his whereabouts unknown, but his last known address being the Harbor Boulevard address.

On September 19, SSA reported Father's whereabouts were still unknown. A police report concerning the stabbing incident indicated the victim claimed he and Father had become friends as cellmates in prison. Once out of prison, Father became his regular drug supplier. Their relationship soured, and Father attacked and stabbed the victim when Father learned the victim had begun having a sexual relationship with Mother. When police interviewed Mother, she denied the stabbing incident had occurred. She said Father might have gone to "his mother's garage at 12742 Bayhill Court in Garden Grove."

Father was not present at the detention hearing on September 19, 2008. A proof of service indicated the petition and notice of the detention hearing was sent to Father by certified mail at the Harbor Boulevard address. At the hearing, Mother confirmed the Harbor Boulevard address was correct but asked that her mail be sent to "12743 Bayhill Court, Garden Grove." Her attorney advised the juvenile court that although Mother and Father were not married, Father was D.E.'s biological father.

Father was in custody when D.E. was born, but he was released two weeks later, and thereafter they lived together as a family. The juvenile court stated that until Father made an appearance, he would remain an alleged father only. Mother was given visitation with D.E. A pretrial hearing was set for October 17, and a jurisdictional hearing trial date set for October 31.

Jurisdictional/Dispositional Stage

In its first report for the jurisdictional and disposition hearing, SSA recommended no reunification services for Mother. The report cited Mother's bad judgment in associating with felons and drug addicts, her failure to reunify with her older child, and her living with Father who was dealing methamphetamine. Because Father's whereabouts were still unknown, SSA deferred any recommendation as to him. Mother had been having two–hour, twice weekly monitored visits that went well. Mother had been directed to complete a substance abuse program and to begin drug testing.

SSA filed a search declaration as to Father. Department of Motor Vehicles records indicated his two last know addresses were the Harbor Boulevard address, and "12437 Bay Hill Court, Garden Grove."[2] Sheriff's department records listed 12437 Bay Hill Court as Father's last known address. On September 22, 2008, notice of the October 17 "pretrial" and October 31 "trial" hearings, a copy of the petition, and a form JV-505 Statement Regarding Parentage were sent to Father by certified mail to the 12437 Bay Hill Court address, and acknowledgement of receipt "bearing a signature believed [by the social worker] to be that of [Father]" was received back. The same documents were sent via certified mail to Father at the Harbor Boulevard address but were returned undelivered. Neither Mother nor Father appeared at the October 17 pretrial hearing.

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[2] Mother variously reported the address as "12742 Bayhill Court" and "12743 Bayhill Court" as opposed to the address found in public records for Father—"12473 Bay Hill Court." That discrepancy is not relevant to the notice issues raised by Father on this appeal.

On October 30, SSA reported D.E. had been recently placed in a new home, he was doing well in that placement, and he was unaffected by the transition to his new caretakers. Mother had ceased attending visits with D.E. and failed to show for drug testing.

Neither Mother nor Father was present at the October 31 jurisdictional hearing. The court found notice had been given to all parties as required by law and SSA had exercised due diligence in its efforts in locating and serving Father. Mother's counsel submitted on the petition. The court entered Father's default on the petition. It declared D.E. a dependent child and set a contested dispositional hearing for November 14.

SSA's November 14 report for the dispositional hearing listed Father's whereabouts as unknown and gave the Harbor Boulevard address as his last known address. Mother continued to miss visits with D.E. and scheduled drug tests. Mother and Father were not present at the dispositional hearing. The court denied services to Mother pursuant to section 361.5, subdivision (b)(10) and (11), and set a permanency planning hearing on March 16, 2009, and a notice review hearing on December 15, 2008. The court ordered "writ advisement to [M]other at her last known address." The November 14 minute order stated the writ notice and the minute order were mailed to Mother and to Father at his last known address—the Harbor Boulevard address.

Permanency Planning Stage

On December 5, 2008, SSA filed notices of the permanency planning hearing that were served on Father and Mother—both at 12437 Bay Hill Court. The proofs of service indicated there had been three unsuccessful attempts to personally serve Father and Mother with the notices at the Bay Hill Court address. On November 30, the notices were left at the Bay Hill Court address with a co-tenant, and mailed to that address on December 1.

On December 15, the social worker filed search declarations. As to Father, the social worker declared that several public records consulted on November 21, 2008, turned up 12437 Bay Hill Court as Father's last known address. On November 21, the social worker mailed notices of the permanency planning hearing to Father at both the Bay Hill Court and Harbor Boulevard addresses, by certified mail return receipt requested, but had had received no receipts. At the notice review hearing, the court again found SSA had exercised due diligence in its efforts to locate the parents and "both parents have received good notice."

On March 16, 2009, SSA reported that on January 9, 2009, through efforts of the social worker, Father was located in a California state prison. On February 25, the social worker learned Mother was now incarcerated as well. Transportation orders for the March 16 hearing were issued for both parents. D.E. was doing well in his placement. The social worker had begun receiving letters from Father asking about D.E.

At the March 16, 2009, permanency planning hearing, Mother was not present. Father was present and counsel was appointed for him. Father denied the allegations of the petition. Father explained he had been in custody when D.E. was born, but he got out two weeks later and had lived with Mother and the child until September 2008. Father was declared the presumed father of D.E., and the court ordered monitored weekly visitation. The permanency planning hearing was continued to April 15.

On April 15, the social worker reported he had received additional letters to D.E. from Father, and Father and D.E. had begun to have in-custody visits that went well. Father's counsel requested the court continue the permanency planning hearing noting he had only recently received Father's file and learned Father hoped to reunify with D.E. The permanency planning hearing was continued to May 15.

On May 14, SSA reported D.E. had appropriate in-custody visits with Mother and Father. Father advised the social worker he wanted to reunify with D.E., but the social worker believed there had been no change in circumstances that indicated

Father could assume full-time care for D.E., given his criminal record, his incarceration, his unresolved substance abuse, and the lack of any completed rehabilitation services. The permanency planning hearing was continued to June 25.

On May 15, Father filed a section 388 petition to modify the dispositional order so as to provide him reunification services. In his declaration, Father explained he fled in September 2008 (when police were looking for him in connection with the stabbing incident) because he "had been warned [he] was being framed, [he already had] two potential felony strikes on [his] record, and [he] was afraid [he] would never see [D.E.] again." Father was taken into custody in Arizona in November 2008 for failing to report to his parole officer and was transferred to prison in California in December 2008. He anticipated being released in September 2009. Father had lived with and provided care for D.E. for almost the first year of his life and was committed to being a good father. In the meantime, while he remained incarcerated, Father had asked for and was waiting to receive books on parenting and was planning on attending in-custody parenting classes. Father admitted "a drug problem in the past" but claimed he had been clean for the last two years, said his current parole officer would be able to confirm his clean drug tests, and offered to submit to a hair follicle test to prove he was drug free. Father said that when he initially spoke to the social worker in January 2009, he was not told he could have reunification services. Since mid-March, he and D.E. had in-custody visits approximately once a week that went very well.

On May 19, the court considered the section 388 petition. Father's counsel argued Father's whereabouts were originally unknown and because he was located within six months of the dispositional hearing, he was entitled to services under section 361.5, subdivision (d). Counsel also argued there was a change of circumstances because Father's whereabouts had become known, he would be getting out of prison in September 2009 (as of the time of the hearing, no charges had been filed against Father arising from the stabbing incident), and he was committed to parenting D.E. The court found there

was no prima facie showing a change in the referral order would be in D.E.'s best interests. It noted Father had fled the state without making any provision for supporting or caring for his child, did not see the child for almost six months, and made no attempts to contact his child until SSA located him in prison. Father provided no documentation to support his claim to have been drug free for the past two years. The court continued the permanency planning hearing to June 25.

At the permanency planning hearing, the social worker testified D.E. was adoptable and his current caretakers wanted to adopt. Father and D.E. had 14 visits approximately once a week—all in custody and monitored. The visits went well and there were no concerns. Counsel stipulated that at each of the visits, there were positive interactions between Father and D.E. Since she stopped visits in October 2008, Mother had four visits with D.E.—all monitored and while in custody. D.E. was sometimes shy at visits with Mother, but otherwise the visits went well and no concerns were noted.

Father testified he lived with D.E. for 10 months prior to the dependency. He provided care for D.E.—feeding and changing him. Father also had an eight-year-old son, who did not live with him, but who lived nearby and who he saw frequently—almost daily. Father conceded he had fled by the time D.E. was taken into protective custody, he did not see his child for many months, and he did not parent him thereafter. Mother testified she and Father provided all the care for D.E. during first 10 months of his life. The juvenile court found D.E. was adoptable and none of the exceptions to termination of parental rights applied. It terminated Father's and Mother's parental rights.

DISCUSSION

1. Notice Issues

Father contends his statutory and due process rights were violated because he was not given adequate notice of the jurisdictional and dispositional hearings and was not given proper writ advisement. We reject his contentions.

Because it is relevant to both the notice issue and Father's argument concerning reunification services, we begin by commenting on Father's status in this proceeding. At the detention hearing, Father was designated an alleged father of D.E. As such, he had only "limited due process and statutory rights." (*In re Paul H.* (2003) 111 Cal.App.4th 753, 760.) "'Alleged fathers have less rights in dependency proceedings than biological and presumed fathers. [Citation.] An alleged father does not have a current interest in a child because his paternity has not yet been established. [Citation.]' [Citation.] As such, an alleged father is not entitled to appointed counsel or reunification services. [Citations.] [¶] Due process for an alleged father requires only that the alleged father be given notice and 'an opportunity to appear and assert a position and attempt to change his paternity status. [Citations.]' [Citation.] The statutory procedure that protects these limited due process rights is set forth in section 316.2." (*Ibid.*)

Section 316.2, subdivision (b), requires that once an alleged father has been identified, the juvenile court provide him with "notice at his last and usual place of abode by certified mail return receipt requested alleging that he is or could be the father of the child. The notice shall state that the child is the subject of proceedings under Section 300 and that the proceedings could result in the termination of parental rights and adoption of the child. Judicial Council form Paternity-Waiver of Rights (JV-505) shall be included with the notice."

Father contends notice of the jurisdictional and dispositional hearings was inadequate because it was sent to the wrong address—the Harbor Boulevard address instead of the Bay Hill Court address—and the notice did not sufficiently apprise him of the nature of the proceedings or of what was at stake. He is wrong. Substantial evidence supports the juvenile court's finding that adequate notice was given.

At the detention hearing, the juvenile court set the pretrial hearing for October 17 and a trial date of October 31. Prior to the October 17 hearing, SSA filed a search declaration indicating various public records showed both the Harbor Boulevard

address and the Bay Hill Court address as Father's last known address. On September 22, 2008, a form notice of the October 17 "pretrial" *and* October 31 "trial" hearing dates, a copy of the petition, and a form JV-505 Statement Regarding Parentage were sent to Father by certified mail to *both* addresses. The package sent to the Harbor Boulevard address was returned undelivered; an acknowledgement of receipt "bearing a signature believed [by the social worker] to be that of [Father]" was received back for the documents sent to the Bay Hill Court address. Although the form notice did not call the October 31 hearing date a "jurisdictional and dispositional" hearing, the notice stated that at the hearings it would be decided whether the allegations of the petition were true. The attached petition clearly warned that parental rights could be terminated and to protect those rights Father must appear in court and answer the petition. And although the actual form is not in this record, we note the form JV-505 specifically warns that "[a]s the child's alleged parent, you will not get services to help you get your child back[,]" and such services are only provided if the court finds "that you are the child's parent[.]" Father did not appear at the October 17 or October 31 hearings.

This case is not like *In re Wilford J.* (2005) 131 Cal.App.4th 742 (*Wilford*), upon which Father relies. In *Wilford,* the social services department notified father of a pretrial status conference. Although the notice warned father "he had the right to be present at the hearing, to present evidence and to be represented by an attorney, as well as that the court may proceed with this hearing whether or not he was present, it did not advise him that the scheduled hearing was a [status conference] and omitted entirely any description of the nature of the proceedings that would take place on the date scheduled." (*Id.* at p. 746.) When the father did not appear, the juvenile court immediately proceeded to adjudicate the case. (*Ibid.*) Noting that section 291 requires notice of the jurisdictional hearing to include the date, time, and place of the proceeding and a statement of the nature of the hearing, *Wilford* concluded it was improper for the juvenile court to convert

a noticed pretrial conference into a jurisdictional hearing without providing proper notice. (*Wilford, supra,* 131 Cal.App.4th at p. 751.)

Although much of the warning language in the notice in *Wilford* is similar to the notice given in this case, there are some significant differences. Unlike *Wilford*, here the notice referenced both the "pretrial" hearing and the "trial" (i.e., jurisdictional) hearing dates, it specifically stated that at the hearings it would be decided whether the allegations of the petition were true, and the notice included a copy of the petition itself that clearly warned that parental rights could be terminated and to protect those rights Father must appear in court and answer the petition. Thus, here Father was informed as to what was at stake at the noticed hearings.

Father also complains the statutory writ notice required after the November 14, 2008, order setting a permanency planning hearing was made (§ 366.26, subd. (l)(3)(A)), was inadequate because it was mailed to the Harbor Boulevard address (instead of Bay Hill Court) and was not given within 24 hours of the hearing as required by court rules (Cal. Rules of Court, rule 5.600(b)(1)).

We need not belabor this issue. Assuming there were any defects in service of the writ advisement, there was no harm to Father. At the time the referral order was made, Father was an alleged father only and as such had no standing to file a petition for extraordinary writ. (*In re Joseph G.* (2000) 83 Cal.App.4th 712, 715.) "'An alleged father in dependency or permanency proceedings does not have a known current interest because his paternity has not yet been established.'" (*Ibid.*) Until such time as Father appeared in the proceedings and asserted his parental status he was not a party, he was "simply an 'interested person' entitled to notice of the proceedings." (*In re Emily R.* (2000) 80 Cal.App.4th 1344, 1356.) Despite having been served with notice of the pending dependency proceedings, Father had not yet taken any steps to become a party of record—he had not appeared or returned the Form JV-505 Statement of Parentage. Therefore, the juvenile court was not required to advise him of any right to file a writ to

challenge the order setting the section 366.26 hearing. We note Father was given proper notice of the permanency planning hearing.

2. Summary Denial of Section 388 Petition

Father contends he was entitled to an evidentiary hearing on his section 388 petition. We review the juvenile court's denial of a section 388 petition without hearing for an abuse of discretion. (*In re Stephanie M.* (1994) 7 Cal.4th 295, 316-318; *In re Angel B.* (2002) 97 Cal.App.4th 454, 460.) Because Father failed to meet his burden to demonstrate his section 388 petition warranted a hearing, we find no abuse of discretion.

To warrant a hearing on a section 388 petition, "The parent seeking modification must 'make a prima facie showing to trigger the right to proceed by way of a full hearing. [Citation.]' [Citations.] There are two parts to the prima facie showing: The parent must demonstrate (1) a genuine change of circumstances or new evidence, and that (2) revoking the previous order would be in the best interests of the child[.] [Citation.] If the liberally construed allegations of the petition do not show changed circumstances such that the child's best interests will be promoted by the proposed change of order, the dependency court need not order a hearing. [Citation.]" (*In re Anthony W.* (2001) 87 Cal.App.4th 246, 250.)

Father's petition sought to modify the dispositional order so as to provide him reunification services. In his declaration, Father explained he fled in September 2008 to avoid possible arrest for the stabbing incident, which if prosecuted could have resulted in a third strike conviction (with an attendant 25-years-to-life sentence), he was taken into custody in Arizona in November 2008, and transferred to prison in California in December 2008. He anticipated being released in September 2009. When the social worker originally located Father in prison in January, he was not told he was entitled to reunification services. But Father was committed to being a good father to D.E., planned

on attending parenting classes while in custody, and had been sober for the past two years.

Assuming Father showed a change of circumstances due to his recently being located in prison by SSA, his elevation to presumed father status, and his desire for services, his petition failed to demonstrate the second aspect of the prima facie showing—that giving Father reunification services would be in D.E.'s best interest. (See *In re Vincent M.* (2008) 161 Cal.App.4th 943, 954 (*Vincent M.*) [where man does not attain presumed father status until permanency stage, reunification services ordered only upon section 388 showing of changed circumstances demonstrating it is in child's best interest to grant services].) "[S]ection 388 makes clear that the hearing is only to be held if it appears that the best interests of the child may be promoted by the proposed change of order, which necessarily contemplates that a court need not order a hearing if this element is absent from the showing made by the petition." (*In re Zachary G.* (1999) 77 Cal.App.4th 799, 807, fn. omitted; see also *In re Kimberly F.* (1997) 56 Cal.App.4th 519, 529 ["It is not enough for a parent to show *just* a genuine change of circumstances under the statute. The parent must show that the undoing of the prior order would be in the best interests of the child"].)

Father's petition asserted it was in D.E.'s best interests to modify the dispositional order and provide Father reunification services because they had been having regular in-custody visits during which Father showed substantial love and concern for his child, Father wanted to raise and support D.E., and D.E. would benefit from having Father in his life. But we cannot say the court erred by concluding this did not suffice to trigger a hearing. D.E. was only 10 months old when he was taken into protective custody in September 2008 because Mother was arrested and Father had abandoned him so as to avoid arrest or possible criminal prosecution. Thereafter, Father made absolutely no effort to contact his child or to ascertain if he was safe and being properly cared for. It was not until the social worker located and contacted Father in

prison that Father asserted any parental interest in D.E. Father had an extensive history of violent and drug-related criminal activity. Father claimed he had been "clean" for two years, but he provided no documentary evidence to support that assertion. He was not anticipating being released from prison for another six months. In the meantime, D.E. was happy and healthy in his placement. The juvenile court did not abuse its discretion by denying Father an evidentiary hearing on his section 388 petition.

3. Section 366.26, subdivision (c)(2)(A)

Father contends termination of his parental rights must be reversed because it violated section 366.26, subdivision (c)(2)(A), which prohibits termination of parental rights if: "At each hearing at which the court was required to consider reasonable efforts or services, the court has found that reasonable efforts were not made or that reasonable services were not offered or provided." Father's argument is, in essence, one about the court's failure to either provide him with reunification services, or to specify a statutory basis for denying them. We find no error.

Father's argument is premised on section 361.5, which concerns provision of, or withholding of, reunification services. Section 361.5, subdivision (a), requires services be ordered for the child, the mother, and the "statutorily presumed father" unless one of the grounds for withholding services set out in section 361.5, subdivision (b), is found to exist. As relevant here, under section 361.5, subdivision (b), services may be withheld if the whereabouts of the parent is unknown (§ 361.5, subd. (b)(1)), or if the parent has failed to reunify with other children who were subjects of a dependency proceeding (§ 361.5, subd. (b)(10) & (11)). Although services may be denied if a parent's whereabouts are unknown, such a finding at the dispositional hearing is not one of the permissible reasons for proceeding directly to a permanency planning hearing (§ 361.5, subd (f)), and instead the juvenile court would generally set a six-month review hearing. Section 361.5, subdivision (d), provides that if services are withheld because the parent's whereabouts are unknown "and the whereabouts of a parent become known

within six months of the out-of-home placement of the child, the court shall order the social worker to provide family reunification services in accordance with this subdivision."

Putting the above together, Father's argument is as follows: At the dispositional hearing in November 2008, services for him were "bypassed" because his whereabouts were unknown. (Mother was denied services due to her failure to reunify with another child.) But his whereabouts became known in January 2009, which was within six months of D.E.'s September 2008 detention. Thus, Father argues that because he was located and achieved presumed father status within six months, the juvenile court was required to provide him with services, or at the very least find one of the grounds for denying services existed.

Father relies on *In re T.M.* (2009) 175 Cal.App.4th 1166 (*T.M.*), a case he characterizes as being factually identical to this case and which he argues compels reversal of the order terminating parental rights. In *T.M.*, at the dispositional hearing, the mentally ill mother's whereabouts were unknown, so the juvenile court denied services under section 361.5, subdivision (b)(1), and it set a six-month review hearing. Although the mother's whereabouts (in a locked psychiatric facility) became known before the six-month review, social services did not notify the juvenile court, no service plan was adopted for her, and at the six-month review a permanency planning hearing was set. (*Id.* at pp. 1169-1170.) In reversing the order terminating the mother's parental rights, the court noted that when the mother's whereabouts became known within six months of the child's out-of-home placement, the court should have been advised so services could be ordered. At the six-month review hearing, the court neither terminated services after finding reasonable services had been provided (because none had been offered), nor denied services for one of the statutorily enumerated reasons. Because neither finding was made at the six-month review hearing, the juvenile court could not terminate parental rights at the permanency planning hearing. (*Id.* at p. 1173.)

The distinction between *T.M., supra,* 175 Cal.App.4th 1166, and the current case is obvious. *T.M.* concerned a mother who was statutorily entitled to services (§ 361.5, subd. (a)), but who could not receive them because her whereabouts were unknown. Here, at the dispositional hearing, the juvenile court did not deny services to Father because his whereabouts were unknown. Father was only an alleged father and as such was not eligible for services. (*Vincent M., supra,* 161 Cal.App.4th at p. 954.) The juvenile court did deny services to Mother because she failed to reunify with other children (§ 361.5, subd. (b)(10) & (11)), a finding that allowed it to set a permanency planning hearing. (§ 361.5, subd. (f).)

In his reply brief, Father attempts to unwind the clock even further. Father argues he should have been declared a presumed father at the outset of these proceedings, based on representations made at the detention hearing that although they were not married, he was D.E.'s biological father, his name was on D.E.'s birth certificate, and commencing upon Father's release from prison two weeks after D.E.'s birth, until Father's going into hiding to evade capture by law enforcement, they had lived together as a family. And, Father urges that because he should have been designated a presumed father at the detention hearing, the juvenile court should not at the dispositional hearing have directly set a permanency planning hearing. Father has waived this argument due to his failure to raise it below. (*In re Melvin A.* (2000) 82 Cal.App.4th 1243, 1252.) Furthermore, we cannot say the information before the juvenile court at the detention hearing compelled a finding he was a presumed father. Father was not married to Mother, and although Mother claimed his name was on D.E.'s birth certificate, there was no definitive proof of paternity.

4. Parental Benefit Exception to Termination of Parental Rights

Father and Mother contend the juvenile court erred by failing to apply the parental benefit exception to termination of parental rights. We find no error.

At a permanency planning hearing, the juvenile court determines a permanent plan of care for a dependent child. (*In re Casey D.* (1999) 70 Cal.App.4th 38, 50.) Adoption is the permanent plan preferred by the Legislature. (*In re Autumn H.* (1994) 27 Cal.App.4th 567, 573-574 (*Autumn H.*).) An exception to the adoption preference occurs when termination of parental rights would be detrimental to the child because the parent has "maintained regular visitation and contact with the child and the child would benefit from continuing the relationship." (§ 366.26, subd. (c)(1)(B)(i).) The parent bears the burden of proof on both these prongs: (1) that visitation was consistent and regular; and (2) that the child would benefit from continuing the relationship. (*In re Melvin A.* (2000) 82 Cal.App.4th 1243, 1253.)

Here, both parents failed to establish the first prong of the parental benefit exception. In September 2008, Father abandoned his 10-month-old child and fled to avoid arrest and possible prosecution for a potential third strike felony. He made no effort to contact his child or inquire as to his well-being. Upon D.E. being taken into protective custody, Mother visited a few times and then ceased visits beginning in October 2008. As the juvenile court noted, it was only through the efforts of SSA that the parents were later found in prison—Father in January 2009, and Mother in February 2009—and visits began. Mother had only a few in-custody visits. Although Father had more, it hardly qualified as the kind of regular and consistent visitation that would justify application of the parental benefit exception.

But even assuming the first prong (regular and consistent visitation) was met, the second was not. To overcome the benefits associated with a stable, adoptive family, the parent seeking to invoke the section 366.26, subdivision (c)(1)(B)(i), exception must prove that severing the relationship will cause not merely some harm but substantial harm to the child. (*In re Brittany C.* (1999) 76 Cal.App.4th 847, 853.) Similarly, "the exception does not permit a parent who has failed to reunify with an adoptable child to derail an adoption merely by showing the child would derive some

benefit from continuing a relationship maintained during periods of visitation with the parent." (*In re Jasmine D.* (2000) 78 Cal.App.4th 1339, 1348 (*Jasmine D.*).)

In *Autumn H.*, *supra*, 27 Cal.App.4th 567, the court articulated a test for determining whether a child would benefit from *continuing* a relationship with the natural parent. To succeed under this test, the parent must establish that "the relationship promotes the well-being of the child to such a degree as to outweigh the well-being the child would gain in a permanent home with new, adoptive parents." (*Id.* at p. 575.) In evaluating this issue, the court must "balance[] the strength and quality of the natural parent/child relationship in a tenuous placement against the security and the sense of belonging a new family would confer. If severing the natural parent/child relationship would deprive the child of a substantial, positive emotional attachment such that the child would be greatly harmed, the preference for adoption is overcome and the natural parent's rights are not terminated." (*Ibid*.) "The exception must be examined on a case-by-case basis, taking into account the many variables which affect a parent/child bond[, including t]he age of the child, the portion of the child's life spent in the parent's custody, the 'positive' or 'negative' effect of interaction between parent and child, and the child's particular needs . . . ." (*Id.* at pp. 575-576.)

"[P]leasant and cordial . . . visits are, by themselves, insufficient to mandate a permanent plan other than adoption." (*In re Brian R.* (1991) 2 Cal.App.4th 904, 924.) "[F]requent and loving contact" may also be insufficient to establish the type of beneficial relationship "contemplated by the statute." (*In re Beatrice M.* (1994) 29 Cal.App.4th 1411, 1418.) "'Interaction between [a] natural parent and child will always confer some incidental benefit to the child[,]'" but the basis of a beneficial relationship is that the parents have "occupied a parental role." (*Id.* at pp. 1418-1419.) "'While friendships are important, a child needs at least one parent. Where a biological parent . . . is incapable of functioning in that role, the child should be given every

opportunity to bond with an individual who will assume the role of a parent.'" (*Jasmine D., supra,* 78 Cal.App.4th at p. 1350.)

Whether we apply the abuse of discretion standard or the substantial evidence standard (see *Jasmine D., supra,* 78 Cal.App.4th at p. 1351 ["practical differences between the two standards of review are not significant"]), the result on appeal is the same. Substantial evidence supports the juvenile court's conclusion termination of parental rights would not cause D.E. detriment because the parents failed to demonstrate the benefit D.E. would receive from maintaining their relationship outweighs the benefit he will gain in a permanent home with adoptive parents. (See *Autumn H., supra,* 27 Cal.App.4th at p. 575 [parent bore burden of establishing termination of parental rights would greatly harm child]; accord *Jasmine D., supra,* 78 Cal.App.4th at p. 1350.)

In re Jerome D. (2000) 84 Cal.App.4th 1200 (*Jerome D.*) and *In re Amber M.* (2002) 103 Cal.App.4th 681 (*Amber M.*), illustrate the compelling evidence necessary to establish the benefit exception. In *Jerome D.*, the child "seemed lonely, sad, and . . . 'the odd child out'" in his placement. (*Jerome D., supra,* 84 Cal.App.4th at p. 1206.) He wanted to live with his mother and had enjoyed unsupervised night visits in her home. (*Id.* at p. 1207.) A psychologist opined the child and his mother "shared a 'strong and well[-]developed' parent-child relationship and a 'close attachment' approaching a primary bond." (*Ibid.*) The court concluded that keeping parental rights intact would prevent Jerome's "position as the odd child out in [placement] from becoming entrenched by a cessation of visits and the loss of his mother while [his half-siblings] continued to enjoy visits and remained [the mother's] children." (*Id.* at p. 1208.)

In *Amber M.*, the court reversed termination of parental rights where a psychologist, therapists, and the court-appointed special advocate uniformly concluded "a beneficial parental relationship . . . clearly outweigh[ed] the benefit of adoption."

(*Amber M., supra,* 103 Cal.App.4th at p. 690.) Additionally, two older children had a "strong primary bond" with their mother, and the younger child was "very strongly attached to her." (*Ibid.*) If the adoptions had proceeded, the children would have been adopted in separate groups. (*Id.* at pp. 690-691.)

Here, the parents did not demonstrate that harm would have ensued from termination of parental rights similar to that demonstrated in *Amber M.* or *Jerome D.* At the permanency stage, the bond the child shares with the parents and the harm that might arise from terminating parental rights must be balanced against what is to be gained in a permanent stable home, and "it is only in an *extraordinary case* that preservation of the parent's rights will prevail over the Legislature's preference for adoptive placement." (*Jasmine D., supra,* 78 Cal.App.4th at p. 1350, italics added.) The parental benefit exception will apply only where the parent has demonstrated the benefits to the child of continuing the parental relationship *outweigh* the benefits of permanence through adoption.

There is no direct evidence on the issue of whether benefits to D.E. of continuing a relationship with Father and Mother outweigh the benefits of permanence through adoption. Thus, resolution of the issue depends on the inferences the juvenile court could permissibly draw from all the evidence.

The parents' reliance on *In re S.B.* (2008) 164 Cal.App.4th 289 (*S.B.*), is misplaced. They cite the case for the proposition the parental benefit exception may apply, even in the absence of either "day-to-day contact" (*id.* at p. 299), or a "'primary attachment'" (*ibid.*). But *S.B.* recognized nonetheless the application of the parental benefit exception still requires evidence "'the child would be greatly harmed'" by severance of the natural parent/child relationship. (*Id.* at p. 297, quoting *Autumn H., supra,* 27 Cal.App.4th at p. 575.)

In *S.B.,* the father had been the child's primary caregiver for three years. (*S.B., supra,* 164 Cal.App.4th at p. 298.) Following the child's detention due to the

parents' drug abuse, the father "'complied with every aspect of his case plan,' including maintaining his sobriety and consistently visiting [the child]." (*Id.* at pp. 293-294.) But the father's emotional and physical health, compromised due to his years of combat service during the Vietnam War, interfered with his ability to reunify, and the father conceded "his current health problems impeded his ability to care for [the child] full time." (*Id.* at p. 294.) A bonding study indicated that "because the bond between [the father] and [the child] was fairly strong, there was a potential for harm to [the child] were she to lose the parent-child relationship." (*Id.* at pp. 295-296.) The social worker admitted there would be "some detriment" to the child if parental rights were terminated. (*Id.* at p. 295.) The juvenile court found the father and the child had "'an emotionally significant relationship' . . . ." (*Id.* at p. 298.) But because the child looked to her grandparents for her daily needs and nurturing, it concluded the parental benefit exception could not be applied. (*Id.* at pp. 296-297.) In reversing, the appellate court concluded application of the benefit exception did not depend on the child's primary attachment. Based on the evidence, including that the father "maintained a parental relationship with [the child] through consistent contact and visitation[,]" the father's "devotion to [the child] was constant, as evinced by his full compliance with his case plan and continued efforts to regain his physical and psychological health[,]" and the evidence the child "loved her father, wanted their relationship to continue and derived some measure of benefit from his visits[,] . . . the only reasonable inference is that [the child] would be greatly harmed by the loss of her significant, positive relationship with [the father]. [Citation.]" (*Id.* at pp. 300-301.)

Unlike *S.B.*, here it cannot be said the only reasonable inference that can be drawn from the evidence is that D.E. would be greatly harmed if parental rights are terminated. Father argues he had lived with and helped care for D.E. for the first 10 months of his life. Although almost six months passed before he began having in custody visits with D.E., once visits began they were regular and frequent. Those

monitored visits went well, and Father demonstrated appropriate affection and concern towards D.E, and D.E. enjoyed the visits. Mother similarly points out she cared for D.E. for the first 10 months of his life, and all reports were the child was well cared for. Although she stopped visiting her son for several months, she too commenced visits in custody (four visits total) and as with Father's visits, her visits with D.E. went very well. But the parents' positive and loving visits with D.E., and the fact they share an affectionate relationship does not compel application of the parental benefit exception. Neither Mother nor Father have occupied a parental role since D.E. was 10 months old. Although D.E. enjoyed visits with his parents, he apparently transitioned easily into his foster placement and was doing very well there. Under the circumstances, we cannot say the juvenile court erred in finding the parents had failed to carry their burden to prove the parental benefit exception applied.

DISPOSITION

The order terminating parental rights is affirmed.

O'LEARY, J.

WE CONCUR:

BEDSWORTH, ACTING P. J.

MOORE, J.